

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of the Commission's Rules)	WT Docket No. 04-435
To Facilitate the Use of Cellular)	
Telephones and other Wireless Devices)	
Aboard Airborne Aircraft.)	

COMMENTS
OF
MORALITY IN MEDIA, INC.

Morality in Media submits these comments in response to the FCC's February 15, 2005 Public Notice seeking comment, inter alia, on the Use of Cellular Telephones and other Wireless Devices Aboard Airborne Aircraft.

I. Privacy and Cellular Technology

As others commentators may have noted, the use of cellular phones on aircraft would be a grave invasion of privacy for those who are forced to sit beside people who are often loud and unconcerned with whatever private matters they may be revealing. This is certainly a nuisance to all the people who have come to enjoy a quiet flight. With the ever-growing pervasiveness of cell phones and wireless technology, it seems that everywhere one turns, there is someone making a call or talking on their cell phone. Amongst this cacophony of cellular banter, the relative quiet and unobtrusiveness of airplane travel can be a godsend, especially to those who live their lives on the go. It would seem a good idea, then, if cellular and

wireless technology is allowed, to mitigate its impact on passengers, who would rather enjoy a quiet flight. Perhaps, this could be achieved by limiting the areas in which calls are permitted and creating something similar to a “smoking section” for those who wish to allow calls.

Congress, through the Electronic Communications Privacy Act of 1986 (“ECPA”), expressed its desire to protect the privacy of individuals when they are using cellular phones. 18 U.S.C. §§ 2510–2521 (2000); *see* John R. Kresse, Comment, *Privacy of Conversations over Cordless and Cellular Telephones: Federal Protection under the Electronic Communications Privacy Act of 1986*, 9 GEO. MASON U. L. REV. 335, 342 (1987) (“One of the stated goals of the sponsors of the ECPA was to provide protection to cellular callers.”). This desire is expressed in the ‘reasonable expectation of privacy’ standard delineated in the Supreme Court decision *Katz v. United States*. 389 U.S. 347, 351–53 (1967). Although a caller on board a flight would have no reasonable expectation of privacy because of the crowded conditions in which he or she made the call, the person on the other end of that call might, and his or her privacy would be invaded if others were allowed to listen to the “private” conversation. Therefore, in this regard, the use of cellular phones on crowded airplanes might frustrate the stated intentions of Congress to protect the privacy of cellular phone users.

II. Indecency and Obscenity Standards

Even graver than the ordinary annoyance that comes from having to listen to someone else talk loudly on his or her cell phone is the possibility that their neighbor is watching indecent or obscene material through the use of his or her cell phone. It is, therefore, imperative that if wireless technology and cellular phones are allowed, provisions noting that indecent, obscene and profane communications are already prohibited be included. Currently, 18 U.S.C § 1464 prohibits the uttering of indecent or obscene language “by means of radio communication.” Cell phone transmissions are a “radio service” under 47 C.F.R. § 22.99 reading “Cellular service. Radio telecommunication services provided using a cellular system.” Thus, any use of cell phones to send obscene, indecent or profane language is forbidden under § 1464 already, and the FCC should make this clear.

The problem with § 1464 is that it does not prohibit the reception of indecent or obscene communications, such as one might receive via a cell phone. In order to make sure that passengers are not subject to the indecent and obscene communications of others, it is necessary to insure that any cellular and wireless communications that are allowed are governed by standards that forbid such communication. The FCC might consider, if the use of cell phones is permitted, a requirement that the person receiving the call turn off the cell phone if obscene, indecent, or profane material appears or is orally received, as a condition of passenger use.

In *FCC v. Pacifica*, 438 U.S. 726 (1978), the Supreme Court held that the FCC could regulate speech that was deemed “indecent.” The Court specifically stated that “[p]atently offensive, indecent material presented *over the airwaves* confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.” *Id.* at 748 (emphasis added). The Court went on to say that “[t]o say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.” *Id.* at 748–49. Because passengers cannot even choose to turn off the offensive and indecent communications that are being carried on another’s cell phone, the need to safeguard their “right to be left alone” carries more weight in the context of an airplane. Moreover, many passengers on planes are children, from whom offensive expression may be withheld “without restricting the expression at its source.” *Id.* at 749.

There is also reason to prohibit this kind of speech under the ‘captive audience doctrine.’ Under this doctrine, the government can prohibit offensive speech when the audience cannot avoid it. *See Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (upholding an ordinance that made it unlawful to picket outside of people’s homes). Although in *Frisby*, the Court emphasized the sacred nature of a citizen’s home, it has applied the ‘captive audience doctrine’ in other less obvious settings.

See id. at 484–85 (“[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions.”). In *Lehman v. Shaker Heights*, the Court stated that “viewers of billboards and streetcar signs had no ‘choice or volition’ to observe such advertising and had the message ‘thrust upon them by all the arts and devices that skill can produce. . . . The radio can be turned off, but not so the billboard or street car placard.’” 418 U.S. 298, 302 (1974) (quoting *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932)) (alteration in original). Just as in this case, passengers on an airplane, like the viewers of billboards, cannot choose to avoid the indecent communications of fellow passengers, nor can they simply tune out the indecent communications being viewed or listened to by their neighbors on a flight. They are truly captive in the full sense of that term, with no choice as to whether they or their children should be exposed to these indecent communications.

This problem is especially exacerbated by the prevalence of cellular phones with the ability to send and receive photos. In 2004 alone, sales of camera phones outnumbered the sales of digital cameras. *See '05: Think hot zones, hybrids and voices over the Internet*, SAN JOSE MERCURY NEWS (Dec. 30, 2004) [hereinafter *Hot Zones*]; Robert Budden, *Asian mobiles top Xmas charts*, FIN. TIMES, at 13 (Dec. 30, 2004) (“This year [2005] sales of video and camera phones are expected to hit new records as mobile phone penetration increases and users continue to upgrade to the latest handsets.”). Cell phones can now play high quality videos, send and receive digital quality pictures, and play games. *See Hot Zones*. Although the range of

technology and the expanded versatility of cellular technology are exciting, there is also a dark side to it, namely in the growing prevalence of pornography available to camera phone users. *See* Exhibit A. A study conducted by Juniper Research found that worldwide revenue from streaming pornography onto camera phones could top \$1 billion in 2005 and reach \$2 billion by 2009. In the North American market, alone, sales are expected to reach \$400 million by 2010. *See* Exhibit B. Some even predict that cell-phone porn could eventually outperform Internet porn. *See* Exhibit C.

Combining the captive audience of an airplane, including children, with the ease of passengers to view, send, and receive indecent and obscene material through the very technology that the FCC is considering loosening is dangerous recipe. This is why if wireless and cellular technologies are allowed on flights, there must be provisions banning the use of such devices for the purposes of viewing, sending, or receiving indecent or profane communications.

As far as obscene communications, these also fall outside the First Amendment's ambit of protection. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–572 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene....”). Thus, there need be nothing besides a rational basis in order to regulate these forms of speech, a threshold which is easily met considering the harm to children and other

passengers that may be suffered from having to tolerate the display of obscene communications on cell phones.

As the Court in *Pacifica* emphasized, “context is all-important” in deciding whether indecent speech must be curtailed in order to protect the rights of others to be left alone. *See Pacifica*, 438 U.S. at 750. What may be viewed without hindrance in the home must, at times, be prohibited from viewing in public or other settings where reasonable adults cannot avoid it and vulnerable children may be exposed. Certainly, in the context of a crowded plane, filled with families innocently attempting to get from Point A to Point B, the display and reception of indecent and obscene material is truly the pig in the parlor that the FCC must prohibit if it permits the use of wireless and cellular technologies on flights. *See id.* at 750–51 (“[A] ‘nuisance may be merely a right thing in the wrong place, -- like a pig in the parlor instead of the barnyard.’ We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.”). However, due to the growing prevalence of pornography and indecency on cellular phones, Morality in Media urges that the FCC continue its ban on cellular and wireless technologies during flights. *See* 47 C.F.R. § 22.925 (“Cellular telephones installed in or carried aboard airplanes, balloons or any other type of aircraft must not be operated while such aircraft are airborne (not touching the ground). When any aircraft leaves the ground, all cellular telephones on board that aircraft must be turned off.”).

III. Rationales for Changing the Rules

Among the FCC's rationales for changing the rules is that it would be "consistent with the Commission's efforts to promote homeland security by increasing communications options available for public safety and homeland security personnel." FCC 04-288, Part I, paragraph 2. However, it seems illogical to remove a blanket ban on the use of wireless and cellular phones if the goal is to make communication easier for homeland security personnel. Creating an exception for these individuals or providing a phone in the airplane for use by emergency personnel or in emergency situations could easily accomplish this.

Second, Morality in Media questions the reasonableness of changing the FCC rules when the Federal Aviation Administration continues to ban the use of cellular and wireless communications because of interference with navigation and communications systems. See 14 C.F.R. § 91.21 ("Any other portable electronic device that the operator of the aircraft has determined will not cause interference with the navigation or communication system of the aircraft on which it is to be used.").

Conclusion

Because of the severe invasion of privacy that would be caused by the use of cellular and wireless technology, the increasing likelihood of indecent and obscene communications these technologies facilitate, the specious reasoning behind the FCC's changing of the rule, and the futility of changing the rule while the FAA still maintains its rule, Morality in Media urges the FCC to continue its current ban concerning wireless and cellular communications on board aircraft.

If the FCC finds that it must relax the rules, the FCC must make it clear that the ban on Obscene, Indecent, and Profane language found in 18 U.S.C. § 1464 applies to cellular transmissions; it must also prohibit the display of obscene, indecent, and profane materials via the cell phone; and, lastly, the FCC should include protections for those who do not wish to be exposed to loud and oft-times obnoxious users by including a “smoking section,” or something with the same effect, on all flights allowing cell phone use.

Appendix A contains the articles from which the above exhibits are garnered.

Respectfully Submitted,
Morality in Media, Inc.

/s/ Paul J. McGeady

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Appendix A

Exhibit A - *Porn on Cell Phones – It may be on the way* (Jan. 14, 2005), NBC10.com, at <http://www.nbc10.com/print/4083722/detail.html>:

“...[Y]our kids might soon be downloading more than ring tones on their cell phones. They could be downloading softcore porn.”

Site last checked May 25, 2005.

Exhibit B - Carol Ellison, *Cell Phone Users Put Porn in Their Pockets* (March 3, 2005), eWeek, at http://www.eweek.com/print_article2/0,2533,a=147020,00.asp:

“Worldwide adult revenues are poised to top \$1 billion this year [2005] and double to \$2 billion by 2009, according to Juniper. ...The North American Market, researchers say, could reach \$400 million by 2010.”

Site last checked May 25, 2005.

Exhibit C - M.J. McMahon, *Cell Porn Could Outstrip Net Porn, If...* (May 12, 2005), AVNOnline, at http://www.avnonline.com/index.php?Primary_Navigation=Editorial&Action=View_Article&Content_ID=222933:

“Porn pundits around the world predict that cell-phone porn could potentially outperform Internet porn in the future.”

Site last checked May 25, 2005.